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Supreme Court, U.S.
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No. 08-667

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 2008

GORDON JOHNSTON,

Petitioner,

v.

TAMPA SPORTS AUTHORITY, AND HENRY G. SAAVEDRA, IN HIS OFFICIAL CAPACITY AS EXECUTIVE DIRECTOR OF THE TAMPA SPORTS AUTHORITY,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

BRIEF OF RESPONDENTS IN OPPOSITION

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COUNTERSTATEMENT OF THE QUESTION PRESENTED

Whether a ticketholder is entitled to a preliminary injunction to prevent a pat-down inspection by a private screener when he voluntarily chooses to attend a private sporting event with knowledge that the pat-down is a condition for admission.

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INTRODUCTION

Petitioner asserted a Fourth Amendment challenge to a security procedure required by the National Football League as a condition of admission to all NFL games.

With knowledge of the requirement, Petitioner elected to attend three Tampa Bay Buccaneers home games, each of which was available to him on television. On each occasion, Petitioner walked to the admission gate, waited in line, and presented himself for a security pat-down by a private screener. No state authority compelled his attendance. No police officer or government employee participated in or compelled him to submit to a pat-down. No deceitful tactics, no threats of criminal penalties, no coercion undermined his ability to make a reasoned and fully voluntary choice between (a) attending the game and being patted down, and (b) watching the game on television and avoiding the pat-down.

This case, which originated in the Florida state courts, came to the Eleventh Circuit on interlocutory review. The district court had confirmed a preliminary injunction, entered by a state court before removal, barring the security pat-downs on constitutional grounds. Based on the totality of the circumstances, the Court of Appeals found that Petitioner had made a voluntary choice in attending the games with knowledge of the pat-down requirement, determined that he had not established a likelihood of success on the merits, and reversed the district court's decision.

That result should come as no surprise; nor should it be the least bit controversial. Every day, similar consent-based security searches are conducted at airports, courthouses, government buildings, and entertainment venues around the country. Courts consistently recognize that such searches are consensual, even in circumstances where the search condition is imposed by the government and even where the condition may implicate a fundamental right, such as the right to interstate travel.

The same conclusion is even more compelling here. The challenged condition was imposed by a private party, not by the government. And Petitioner seeks not to exercise a constitutionally protected right, but merely to enjoy a football game.

STATEMENT

1. Respondent Tampa Sports Authority ("TSA") is a public agency charged with responsibility to plan, develop, and maintain sports and recreational facilities in the Tampa Bay area.[1] TSA operates Raymond James Stadium, home to the Tampa Bay Buccaneers, an NFL franchise.

The Buccaneers use the stadium pursuant to a Stadium Agreement that obligates TSA to "make proper rules and regulations for use of the Stadium with regard to all Stadium Events, provided, however, that the content of such rules and

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[1] Respondent Henry G. Saavedra is a nominal party, named only in his official capacity as TSA's Executive Director.

regulations shall be reasonably consistent with the rules and regulations enacted for other NFL stadia ..." Pet. App. at A-5.

Since at least 2001, NFL games have been identified by the federal government and numerous security experts as especially attractive terrorist targets. The risk of terrorist attack at an NFL game is considered so substantial that the FAA has restricted airspace over all NFL games, including games at Raymond James Stadium, and Congress has ratified the restrictions. *See* Pub. L. No. 108-199, div. F, tit. V, § 521, 118 Stat. 3, 343 (2004); FAA Notice to Airmen, FDC 3/1862 (June 18, 2007); FAA, 14 C.F.R. § 91.137 (2008).

2. In the wake of 9/11, acting on the advice of law-enforcement officials and private security professionals, the NFL implemented enhanced security measures for all of its games. In 2005, following a series of suicide bombings against soft civilian targets, including deadly attacks in Madrid and London, the NFL Commissioner required that all persons entering NFL stadiums on game day be patted down as a condition of admission to the game.

The upper-body pat-downs, conducted by private security screeners, address the particularized risk of an "improvised explosive device" (*e.g.*, a suicide bomb) concealed on a person's torso. The pat-down is different in purpose from and significantly less invasive than an ordinary police-style frisk.

Even before the pat-downs were required, fans at Raymond James Stadium were subject to searches for ordinary contraband as a condition of entry to Buccaneers games. In September 2005, the same

private security personnel implemented the NFL-mandated pat-down procedure.

Prior to the 2005 regular season, the Buccaneers and TSA informed ticketholders that pat-downs would be added to the existing security procedures as a condition of entry to Buccaneers home games. Notice was provided directly to ticketholders as well as through press releases, the team's website, handbills distributed to cars entering the stadium parking lot, audio recordings played at regular intervals near the stadium gates, and signs posted at each stadium entrance. Pet. App. at A-7.

3. Tickets for Buccaneers games are licenses, revocable at will by the Buccaneers for any reason, subject to a refund. "The NFL and the Buccaneers explicitly retained the right to exclude [Petitioner] from the Stadium for any reason." *Id.* at A-18.

Petitioner knew, prior to attending each of the first two games of the 2005 regular season, that a pat-down was a condition of entry to the game. Petitioner also knew that he could avoid the pat-down by not attending the game. He nonetheless elected to attend those games, each time voluntarily presenting himself at the gate for a pat-down so that he could watch the game in person. *Id.* at A-6 to A-7.

After the second such home game, Petitioner filed suit in Florida state court on October 13, 2005, seeking to bar the pat-downs under the Florida constitutional counterpart to the Fourth Amendment. He attended (at least) a third game after filing suit and again elected to be patted down. *Id.* at A-7.

4. On November 2, 2005, a Florida state court issued a preliminary injunction barring pat-downs at

Buccaneers home games; that court concluded that the pat-downs violated the state constitution. TSA immediately appealed; the preliminary injunction was automatically stayed pursuant to Florida Rule of Appellate Procedure 9.310(b)(2). After the trial court denied his motion to vacate the automatic stay, Petitioner filed an emergency motion with the Florida Second District Court of Appeals, which vacated the automatic stay on November 4, 2005. *Id.* at A-8.

On November 3, 2005, Petitioner amended his complaint to add a claim under the Fourth Amendment to the United States Constitution and to seek damages pursuant to 42 U.S.C. § 1983. TSA then removed the action to the United States District Court for the Middle District of Florida on November 30, 2005, and promptly filed a motion for reconsideration of the preliminary injunction. The District Court denied that motion on July 28, 2006. TSA then filed an interlocutory appeal to the United States Court of Appeals for the Eleventh Circuit. *Id.* at A-8 to A-9.

5. On June 26, 2007, the Court of Appeals issued a *per curiam* opinion holding that the preliminary injunction had been entered in error. Petitioner filed a petition for rehearing *en banc* on July 17, 2007. On June 18, 2008, the original panel (Judges Birch, Fay, and Duffey, sitting by designation) reaffirmed its earlier opinion in a revised, 20-page opinion that addressed at length -- and soundly rejected -- all of the arguments raised by Petitioner in his petition. *Id.* at A-4.

Among other things, the appellate court recognized that the issue of consent "is a fact question determined by the totality of the circumstances. . . on

a case-by-case basis." *Id.* at A-12 (citations omitted). In a lengthy fact-based analysis, the Court determined that Petitioner had consented to the pat-down and that his consent was voluntary. *Id.* at A-12 to A-17.

> Considering the totality of the circumstances, the Court concludes that [Petitioner] voluntarily consented to pat-down searches each time he presented himself at a Stadium entrance to attend a game. The record is replete with evidence of the advance notice [Petitioner] was given of the searches including preseason notice, pregame notice, and notice at the search point itself. It was clear error for the District Court to find that Johnston did not voluntarily consent to the pat-down searches.

Id. at A-20. The Court also observed that:

> [Petitioner] had no ... constitutional right to enter the Stadium for a Buccaneers football game. None of [Petitioner's] other rights appear to be impeded by the pat-down searches -- not even a property right, as [Petitioner's] ticket granted only a privilege and did not guarantee him a seat. [Petitioner] simply had no right to be in the Stadium during an NFL football game, and the revocable license granted by his ticket made clear he could be excluded for any reason.

Id. at A-14 n.7, A-15 to A-16.

Finally, the Court emphasized that "[t]he pat-down policy in this case was developed and mandated by the NFL Commissioner and applied exclusively to NFL events. The NFL and the Buccaneers do not have a law enforcement function that could have been served by the pat-downs; the record reflects instead that the NFL crafted the policy solely to protect its patrons from harm." *Id.* at A-14 n.7, A-16 to A-17.

Accordingly, the appellate court held that Petitioner had not shown a substantial likelihood of success on the merits and it reversed the decision of the district court granting the preliminary injunction. *Id.* at A-20.

Petitioner's *second* petition for rehearing *en banc* was denied on August 18, 2008, without any judge of the Eleventh Circuit requesting a poll.

Petitioner moved for a stay of the mandate, which a single judge of the Eleventh Circuit initially granted. TSA immediately filed a motion for reconsideration; the original three-judge panel unanimously vacated the stay and ordered that the mandate issue forthwith. On September 25, 2008, the district court dissolved the preliminary injunction.

There have been no further substantive proceedings in the district court. And, of course, there is no final judgment.

REASONS WHY THE PETITION SHOULD BE DENIED

Petitioner does not contend that the Court of Appeals applied the wrong legal standard in holding that the District Court erred in granting the preliminary injunction. Nor is there any serious basis for suggesting that the decision below conflicts with the decision of any other court.

Correctly applying *Schneckloth v. Bustamonte,* 412 U.S. 218, 219 (1973), the Eleventh Circuit concluded that the totality of the circumstances "demonstrate the voluntariness of [Petitioner's] consent." Pet. App. at 16. That conclusion can hardly be challenged in light of (a) Petitioner's repeatedly electing to attend Buccaneers' games with prior knowledge that a pat-down was a condition of admission and (b) the absence of *any* evidence in the record suggesting governmental coercion or pressure.[2]

I. There Is No Conflict Warranting Review.

1. The principal basis for certiorari asserted by Petitioner is a purported *intra-Circuit* conflict between the decision below and *Bourgeois v. Peters,* 387 F.3d 1303 (11th Cir. 2004). That asserted conflict

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[2] The Court of Appeals also found that Petitioner had consented to the pat-downs under the implied consent analysis developed by the Florida state courts. Pet. App. at 17 (citing *State v. Iaccarino,* 767 So.2d 470 (Fla. Dist. Ct. App. 2000)). Relevant to that decision was the Court's finding that the pat-downs supported a "vital interest," in that they had been required "specifically to guard against mass casualties at NFL games from a potential terrorist attack." Pet. App. at A-17.

is illusory. The fact that Judge Birch was on *both* Eleventh Circuit panels -- and the absence of even a single vote for rehearing *en banc* -- so confirm.

Bourgeois involved mass, suspicionless searches by law enforcement personnel as a condition of participating in political demonstrations protected by the First Amendment. *Id.* at 1310. The decision below noted and took account of "the many material differences between the search policy instituted in *Bourgeois* and the pat-down search at issue in this case." Pet. App. at A-14 to A-16 n.7. Those differences included (a) the fact that the searches in *Bourgeois* had been "enacted to serve the City's normal law enforcement function," and (b) the fact that unlike the political demonstrators, who had an undisputed right to assemble in the public place of the demonstration, "[Petitioner] had no right to be in the Stadium during an NFL game." *Id.* Accordingly, there is no intra-Circuit conflict.

And if there were such a conflict, it would be for the Eleventh Circuit -- not this Court -- to resolve in the first instance.

2. Nor is there any conflict between the opinion below and the holdings of *Blackburn v. Snow*, 771 F.2d 556 (1st Cir. 1985), and *Cochrane v. Quattrocchi*, 949 F.2d 11 (1st Cir. 1991). In those cases, the First Circuit carved out a special rule for strip and body cavity searches required of prison visitors as a condition of entry. Because it found that such searches "by [their] very nature, constitute[] an extreme intrusion upon personal privacy, as well as an offense to the dignity of the individual," the First Circuit held that "some as yet undefined 'level of individualized suspicion' is necessary before a strip

search of a prison visitor can be reconciled with the requirements of the Fourth Amendment." *Cochrane*, 949 F.2d at 13. In other words, the First Circuit held that in the special context of strip searches, the issue of consent may not even be reached in the absence of individualized suspicion. Accordingly, those cases present no conflict with the Eleventh Circuit's conclusion that consent was voluntary under the totality of the circumstances presented here.

There can be no comparison between the limited upper body pat-downs at issue here and the invasive strip searches addressed by the First Circuit. Numerous other important factors distinguish those cases from the case below, including the facts that (a) the pat-down requirement here was imposed not by the government but by a *private* party, the NFL, and (b) the "benefit" at issue here is a revocable privilege conferred by that private party, not something (*e.g.*, access to visit an incarcerated prisoner) over which the government has control. The Court of Appeals correctly recognized these fundamental distinctions: "Because the condition was imposed by a private party, [Petitioner] was not forced by the *government* to choose between assertion of his constitutional rights and obtaining a [government] benefit to which he was entitled." Pet. App. at 19 (emphasis added).

In any event, the First Circuit has since confirmed that the purported "unconstitutional conditions" doctrine, on which its strip search cases relied, does not apply "[i]n the absence of any showing that state action prompted the imposition of the alleged" condition. *United States v. Woodrum*, 202 F.3d 1, 10 (1st Cir.), *cert. denied*, 531 U.S. 1035,

121 S. Ct. 622 (2000). The evidence here is undisputed that the NFL prompted the imposition of the pat-down requirement. *Id.* at A-5, A-6.

3. Petitioner also asserts a conflict between the Eleventh Circuit's holding and a single decision of an *intermediate* appellate court in Florida. *State v. Iaccarino,* 767 So. 2d 470 (Fla. Dist. Ct. App. 2000). But the Eleventh Circuit expressly *applied* the test for implied consent recited in *Iaccarino.* Pet. App. at A-13, A-17. Moreover, the purported conflict with *Iaccarino* turns on Petitioner's assertion that he was not offered a refund for his ticket. That assertion, which is inapposite given his testimony that he would not have accepted a refund (*id.* at A-7), is hardly a reasonable predicate for asserting a conflict justifying this Court's review. That is especially so given that there is neither a final judgment in this case, which was before the Eleventh Circuit on interlocutory review, nor a ruling of Florida's highest court on the issue presented.

4. Nor is there a conflict presented by the decisions of the state high courts on which Petitioner relies. The claim in *Nakamoto v. Fasi,* 635 P.2d 946, 949 (Haw. 1981), arose in the context of "a City policy requiring rock concert promoters at [a city owned facility] to conduct" searches of their patrons; here, a private entity required the pat-downs. *State v. Carter,* 267 N.W.2d 385 (Iowa 1978) and *State v. Selgen,* 700 N.W.2d 702 (N.D. 2005), both involved fact-specific inquiries into whether there had been voluntary consent to searches conducted by

uniformed police officers.[3] Here, an equally fact-specific inquiry -- citing Petitioner's actual advance knowledge of the pat-down requirement, his election to choose to attend Buccaneers games, the absence of any evidence of coercion, and the fact that Petitioner was not in custody at the time of searches and did not believe that the searches would disclose incriminating evidence -- led the Court of Appeals to the opposite conclusion. Pet. App. at A-16 to A-17. These cases do not present a conflict, much less one warranting certiorari.

II. The Decision Below Is Fully Consistent With This Court's Established Precedents.

The decision below would be in full accord with this Court's precedents even if one assumed (a) that the state had imposed the pat-down requirement and (b) that the "right" to attend professional football games is subject to constitutional protection.

Thus, for example, in *Wyman v. James*, 400 U.S. 309, 324 (1971), the Court held that a state may reasonably condition participation in a welfare assistance program on consent to a home search, even if the plaintiff's refusal to consent would result in the loss of benefits. Under such circumstances,

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[3] Each court raised questions about whether the defendant was aware of -- and whether the state even provided effective notice of -- the search policy. *State* v. *Carter*, 267 N.W.2d 385, 387 (Iowa 1978); *State v. Selgen*, 700 N.W.2d 702, 709 (N.D. 2005). In *Selgen*, for example, there was no evidence that the defendant knew he had a choice to "consent to the search or leave." *Id.* at 711 (Maring, J., concurring). The facts here are fundamentally different.

"[t]he choice is entirely hers, and nothing of constitutional magnitude is involved." *Id.*

The Courts of Appeals have applied similar reasoning to consent-based government searches, finding consent to be valid so long as the individual had a clear choice. *See, e.g., Gilmore v. Gonzales,* 435 F.3d 1125, 1139 (9th Cir. 2006) (concluding that an airline passenger "had a meaningful choice" to submit to a search or to leave the airport); *United States v. Sihler,* 562 F.2d 349, 351 (5th Cir. 1977) (concluding that a prison guard had impliedly consented to search by voluntarily accepting and continuing employment); *McMorris v. Alioto,* 567 F.2d 897, 900-01 (9th Cir. 1978) (concluding that an attorney had voluntarily consented to a search even though he might otherwise have "to forego the practice of law.").

Just as the airline passenger, traveling on a private carrier that departs from a public facility, made a voluntary choice when he reached the security gate at the airport concourse, so too did Petitioner, eager to attend a private sporting event hosted at a public facility, make a voluntary choice when he reached the gates of the stadium. Both had knowledge of the security requirement; both had alternatives (*i.e.*, traveling by bus or car, watching the game on television). The only differences relevant to the issue of consent are (a) that only the airline passenger sought to engage in a constitutionally-protected right, and (b) that only the airport security procedures were required by and implemented by the government.

If an airline passenger is deemed to have given his voluntary consent when he elects to

present his boarding pass at the concourse gate, so too must Petitioner be deemed to have given his voluntary consent when he presented his revocable ticket at the stadium gate.[4]

CONCLUSION

For the foregoing reasons, the petition should be denied.

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[4] Nothing in the Eleventh Circuit's opinion stands for the proposition that Petitioner's "past consent" to the pat-downs "waives his right to seek injunctive relief to prevent an *unconstitutional* future search." Pet. App. at 3 (emphasis added). The Court of Appeals' interlocutory decision simply holds that Petitioner is unlikely to prevail on the merits of his claim in the absence of a showing that he was compelled by state action to attend a game, that he was compelled by a police officer to submit to a pat-down, or that governmental coercion undermined his otherwise voluntary choice to attend a private entertainment event with actual knowledge of the pat-down requirement.

Petitioner failed to make such a showing below. If he fails to make such a showing in some future challenge, the same result should obtain, not because of a "waiver" but rather because pat-downs in such circumstances are not unconstitutional.